The law in this form remained for two hundred years unchanged. But in 1621, in the case of *Broad vs. Jollyfe*, Cro. jac. 596, the law was relaxed somewhat, and it was decided that, for a valuable consideration, one might agree not to use his trade in a particular place. It was said that the consideration was necessary in order to balance the restraint of trade. So too in *Davis vs. Mason*, T. R. 118, decided in 1793, a contract to refrain from a trade limited as to time and place, and founded on a valuable consideration, was held good. The basis of these decisions was that the restraint was limited in space for as it is said Cowen 307, decided in 1827, that "a restraint throughout the kingdom" was bad.

The final step in the development of this law, as shown by the modern authorities, was to disregard the partiality of the restraint, and decide the legality of each contract on its own facts and circumstances. The question as to the validity of the restraint imposed at present depends on what is reasonably necessary to protect the person for whose benefit the contract was made, having regard to the nature of the business and the territory embraced in its trading operations. *Diamond Match Co. vs. Robeer*, also *National Benefit Co. vs. Union Hospital Co.*, 11 S. R. A. 437 and cases cited.

In the case of persons owing a duty to the public, another question enters into such a contract. Here the public is affected more directly, and if the public interests are endangered, the contract threatening them must fall. In *Clemons vs. Meadows*, the two contracting parties were the owners of the only two first-class hotels in the town. An agreement to close one although for a limited time might affect the travelling public seriously. Although it is admitted that a hotel-proprietor might close his hotel if he so desires, yet the interest of the public demands that he shall not contract away his right to keep his hotel open in favor of a competing hotel manager. The court thus applies the same reasoning to agreements in respect to hotels as it does to similar contracts between railroads; the *ratio decidendi* is not the character of the contract, but the character of the contracting parties. But this power of the courts to declare a contract void on the grounds of public policy should be exercised guardedly, as it is quite as much in accord with justice that the liberty to make a legal contract should be protected as that a remedy for a breach of an illegal contract should be denied.

THE RIGHT TO SPECULATE IN THEATRE TICKETS UPHELD.

A decision of interest to proprietors of theatres, college athletic associations and all who sell tickets for any public performance or amusement was recently rendered by the Supreme Court of California in the case of *Ex Parte Quarg*, reported in the 84 Pac. 766.

In 1905 the Legislature of California passed a statute pro-

hibiting any person from selling tickets to theatres or other public places of amusement for a price higher than that originally charged by the management. An examination of the statutes of the various states discloses no similar enactments and it was probably passed in response to the constantly growing demand for the suppression of the professional ticket speculator.

The act is declared unconstitutional—not because it contravenes the 14th Amendment as to liberty of contract—but generally as opposed to that clause of the California constitution which secures to every person the right of "acquiring, possessing and protecting property."

There are two subsidiary grounds which seem to have much bearing on the final decision.

The first is that the right to provide entertainment for the public and to sell tickets therefor is strictly private and not a matter of such public concern or general interest as to come within the police power on the basis of protecting the public health, morals, safety or general welfare.

The second ground is that the statute in question does not attempt to prevent the simple resale or transfer of such tickets but only a resale at an *advanced* price over the original selling price and also that it is directed against the resale of all tickets whether assignable or not. Under the latter objection either or both the original or subsequent owners are bound by a scale of prices fixed at a level prescribed by the state.

It is at least questionable whether in any of the other states a theatre ticket is *property*. At common law it was a mere license revocable at the option of the original seller and to be held upon any condition which he might see fit to print upon it. Should the holder be refused admittance or, under the earlier decisions, even if expelled, his only redress was an action for the purchase price and the direct expenses to which he had been put by the refusal or ejection. *Horney v. Nixon*, 213 Pa. 20 (decided in 1905).

The right of the original vendor to make the ticket not transferable by a printed notice thereon was undisputed or at least not seriously contested, at least in this country, until the case of *Hollister v. Hayman*, 183 N. Y. 250. This was a test case and arose from the endeavors of a New York manager to drive away the speculators from the sidewalk in front of his theatre. All tickets sold at the box-office contained the restriction that they would not be honored if bought from *anyone* on the sidewalk in front of the theatre. The 14th Amendment was invoked by the speculators but the manager's right to freely impose any lawful conditions he saw fit was upheld by the Court of Appeals.

In 1893 the Legislature of California passed an act making a theatre ticket property, when sold unconditionally, and providing that any manager, proprietor, etc., who should refuse the holder admission to the place of amusement be fined $100, making a demand for admission necessary and operating only in

favor of those who presented themselves in proper condition for admission.

Tickets on which any conditions were printed or restrictions made in writing or printing by the original vendor were excepted from the operation of the act. In the case of *Greenberg v. Western Turf Assoc.*, 140 Cal. 360, the Supreme Court of California held the act to be constitutional and by this decision, probably for the first time, a theatre ticket was made property in the full sense of the word.

Conceding therefore that the regulation of traffic in theatre tickets is beyond the police power of the state, the decision in the latest case (*Ex Parte Quarg*) is justified by the statute of 1903, making the ticket property when sold without conditions. The distinction drawn between the regulation of all sales and the prohibition of sales at an advance while clear enough is unnecessary to the decision of the case.

While all theatre-goers realize and feel the effect of the tendency to manipulate the sale of tickets for all the popular amusements and to hold the most desirable seats at almost prohibitive figures, a summary of the decisions would indicate that the remedy must be provided by the proprietors or managers of the amusements and that such control or regulation is entirely beyond the power of the Legislatures.

THE RIGHT OF A JURY TO DRAW ANY INFERENCE FROM THE REFUSAL OF A PARTY TO WAIVE PRIVILEGE.

In the late case of the *Penna. R. R. Co. v. Durkee*, decided July 24, 1906, the U. S. Circuit Court of Appeals for the second circuit overrules the Appellate Division of the New York Supreme Court, by holding that in an action for damages, for injuries to the person, the trial judge properly refused to charge the jury that they might infer that the plaintiff's refusal to waive her privilege, and allow her physician to testify as to her condition, was due to the fact that such testimony would have been unfavorable to her, or in fact to make any inference at all.

This question of inference from refusal of party to waive privilege has been a long mooted one, and in the case of *Deutschmann v. Third Ave. R. R. Co.*, 87 App. Div. 503, where the facts were very similar, the Appellate Division holds directly opposite to the case under discussion, and in the opinion says; "the jury is always justified in talking into consideration the attitude, appearance, and acts of parties and witnesses upon a trial, and to deduce therefrom such inferences as fairly arise out of the given circumstances, and we see no reason why they may not also take into consideration any objection interposed which shuts out the introduction of testimony. And in *William v. Roch R. Co.*, 3 App. Div. 109, the court in discussing this question says: "I think the rule is as applicable to a case in which a party fails to interrogate a friendly witness, so situated as to be presumed to have knowledge of the existence or non-existence, of the vital facts in